SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 799

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

MADDEN FURNITURE, INC. AND MARGUERITE MADDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Statement.

The chronological record of these cases is set forth in the petition for certiorari. Petitioner's interpretations of the various holdings of the Circuit Court of Appeals do not in all respects coincide with ours. Such differences as are deemed material will be noted in the argument.

Petitioner does not discuss the evidence, either in its petition or brief. This, too, we shall briefly discuss in our argument.

Questions Presented.

The only question, it seems to us, is whether petitioner has made it appear that the Circuit Court of Appeals has misapplied the Florida decision, *Metropolitan Life Insur-*

ance v. *Poole*, 3 So. (2) 386, decided by the Florida court subsequent to the first decision in these cases by the Circuit Court of Appeals (117 F. (2) 446).

ARGUMENT.

Did the Circuit Court of Appeals misconstrue the decision of the Florida Court in the Poole case?

The Florida court is required by statute to prepare headnotes (Sec. 25.27—Fla. Statutes, Ann. 1941), epitomizing its decisions. The escond headnote in the *Poole* case (3 So. (2) 386), sustained in the body of the opinion, reads:

> "False answers, made by insured in good faith, to questions in application for life insurance policy, do not vitiate policy."

Upon its face this squarely counters the proposition announced by the Circuit Court of Appeals in its first decision (117 F. (2) 446):

> "* * * its giving (the false answers) prevented recovery on the policy without regard to whether the answer was given with a conscious, fraudulent purpose to deceive."

The opinion in the *Poole* case does not state what questions in the application had been falsely answered, it does not reveal what the evidence was, nor does it contain the charges given. It shows the charges given by the trial court were made the basis of assignments of error "second" to "ninth", and holds: "The charges complained of were appropriate to the issues made by the pleadings and the evidence."

In this state of affairs and in order that the Circuit Court of Appeals might see exactly what issues were made by the pleadings, what the evidence was, and what the

charges were, we filed a certified transcript of the *Poole* case with that court, having in mind that an appellate court will examine the record of a prior case for the purpose of understanding the opinion (*Elizabethport Cordage Co.* v. *Whitlock*, 190 So. (Fla.) 20; *Sholtz* v. *Hartford Acc. & Ind. Co.*, 5 Cir., 88 F. (2) 184), and having also in mind the admonition of this court that it is the duty of the federal courts "to ascertain from all available data what the state law is and apply it" *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223; 61 S. C. T. 179. The record is, of course, available data, certainly to the extent it explains and clarifies the holding of the court.

The opinion of the Circuit Court of Appeals quotes two of these charges, showing that it made use of the record. This was made the basis of some complaint in a petition for rehearing filed by petitioner in that court (R. 223).

Now, petitioner is asking this court to hold that the Circuit Court of Appeals misconstrued the holding of the *Poole* case, and this without bringing to this court the record of the *Poole* case.

The broad rule announced in the *Poole* case (headnote above quoted), if applied literally, would make it unnecessary even to read the text of the opinion. Petitioner itself, however, says, in effect, that that has got to be limited to the facts of the case, that it should not be applied except to cases like the *Poole* case. Then it contends that the *Poole* case opinion shows that it was entirely different from the cases at bar. But one cannot escape the conclusion that while the opinion in the *Poole* case does not so clearly show the facts were like those in the cases at bar, it certainly does not show that the facts of that case are different from those in the cases at bar. The categorical language of that opinion condensed into the second headnote, immediately arrests attention; and when it appears that the Circuit Court of Appeals examined the record and

specifically held that the language did apply to these cases, and control them, it is a refusal to face the facts to come before this court without that record and strain at an impossible construction of the opinion.

Note the positive language of the Circuit Court of Appeals (R. 218):

> "We are equally without doubt, however, * * * that the Supreme Court of Florida in the *Poole* case has laid down a different rule from that announced by us, and that under that rule it was for the jury to say whether Madden's answer to question 13, though false, was made in good faith and, therefore, did not vitiate the policy. This is made clear not only by the headnote * * * but by the court's express approval of the charges five and six, the giving of which were assigned as error" (quoting these charges).

No Misconstruction of Poole Case.

It is clear that in order to demonstrate any misconstruction of the *Poole* case, the record of that case must be considered. It is equally clear that the Circuit Court of Appeals considered both the opinion and record. Every presumption is to be indulged in favor of the correctness of that court's opinion and judgment, until the contrary is made to appear.

Beyond this, it is demonstrable that the Circuit Court of Appeals came to the right conclusion, under Florida law, and indeed, under the great preponderance of authority. This may be done upon two theories, first, that false answers innocently made, or made without intent to deceive, do not destroy the insurance (charge 5 in note 8, Record page 218), and second that false representations in applications for life insurance concerning consultations with or treatments by a physician do not furnish the basis for avoiding the policy unless they relate to some *serious*

ailment material to the question of life expectancy (Charge 6 from *Poole* case quoted under Note 8, Record page 218).

Good Faith.

These policies provide that in the absence of *fraud* the answers to the questions shall be deemed representations and not warranties (R. 7). Under this provision it is generally held that an answer, to defeat the insurance, must be shown to have been false *and* that it was made knowingly for the purpose of deceiving the insurer, the burden of such showing being on the insurer. *Wharton* v. *Aetna Life Ins. Co.*, 8 Cir., 48 F. (2) 37; *Northern Life Ins. Co.* v. *King*, 9 Cir., 53 F (2) 613; *New York Life Ins Co.* v. *Simon*, 1 Cor., 60 F. (2) 30; *Weintraub* v. *New York Life Ins. Co.*, 3 Cir., 85 F. (2) 158; *Golightly* v. *New York Life Ins. Co.*, 8 Cir., 85 F. (2) 122. Similar decisions from both state and federal courts could be multiplied by the score. The rule adopted by the Florida court in the *Poole* case is in essence the same.

The contention of petitioner is that question 13, asking what hospitals, doctors, etc., applicant had consulted, as distinguished from question 11, asking if applicant had had stated diseases, calls for facts and not opinions, as the Circuit Court of Appeals first held; that if falsely answered there can be no recovery, and that the fraudulent purpose of the applicant, or absence thereof, is of no consequence. Aside from the fact that the *Poole* case overrules it, the contention overlooks the factor that charge 6 (R. 218, note 8) establishes that only consultations or treatments for those ailments which have a "material bearing on life expectancy" need be stated, and that there is no distinction between the question whether applicant is in good health and the question whether he has consulted or been treated by a physician. This charge completely obliterates the distinction first drawn by the

Circuit Court of Appeals, and still insisted upon by petitioner, between the two classes of questions.

Concede the law to be as set forth in charges 5 and 6 (note 8, R. 218). Concede that Mr. Madden had consulted a doctor which he, for some reason, failed to disclose in answer to question 13; concede, as the evidence shows, that he consulted the doctor several times over a period of months (R. 28); concede that the ailment occasioning the consultation was nothing but a trivial and passing ailment (R. 180), that it was not a disease but only a functional thing (R. 31) having no connection with the coronary thrombosis of which Madden died (R. 33), that he worked all during the time (R. 205), in fact sold the doctor during the time of these consultations a large collection of furniture (R. 189); and concede that the last time he saw the doctor he was told by the doctor that he was perfectly sound and well and could get any kind of insurance he wanted (R. 33), the question inevitably arises: Did he withhold the information with the intention of deceiving the insurer, did he forget it in the hurry and stress of circumstances under which he answered the question (R. 202-203), or did he in good faith, even though he may have recalled the facts, fail to detail the consultation because he understood from his own doctor that he had only had a trivial ailment of no materiality to his life expectancy, and that such things need not in reason or under the law be detailed? Either alternative may explain the absence of the information in his answer, and the fact that this is so necessitates submission of the question to the jury.

He is unable to answer for himself, but he was known as an honest, reliable man (R. 202). No presumption of fraud is to be indulged. The burden was on petitioner to show it. There was not the slightest attempt to do so.

If one will keep in mind that although the form of question 13 is: What clinics, hospitals, physicians, etc., Madden

had consulted or been treated by within the last five years (R. 119), nevertheless the law enters into and becomes a part of the question, and modifies it so as to make it ask only concerning "serious ailments" material to the question of life expectancy, and that even if the applicant answers falsely, but in good faith, the policy is not vitiated (charges 5 and 6, R. 218, note 8), he will have no difficulty in concluding, as did the Circuit Court of Appeals, that, under the evidence, this was a jury case.

No Materiality To Life Expectancy.

Mr. Madden was manager of a furniture store in Gadsden, Alabama, when the consultations with the doctor occurred which he failed to disclose. One day the doctor, an acquaintance, was in the store figuring on some furniture and Madden said something to him about having a cold (R. 30). The doctor told him if he would come by the office he would examine him. Madden went, and in the course of the examination, in his regular routine, the doctor developed that Madden was a heavy eater and frequently after eating heavy meals, highly seasoned foods, he would have heartburn. The doctor examined him thoroughly, his heart, lungs, and kidneys and found nothing wrong (R. 30). Then he gave him barium and examined him under the fluoroscope, which showed nothing wrong except it revealed what the doctor diagnosed as cardio spasm, which he described as a spasm of the muscles in the upper part of the stomach not permitting foods to enter the stomach when ingested rapidly which was due to dietary indiscretion; not a disease but a functional sort of thing arising from eating too much or too rapidly, and overwork, which made him have a sense of fullness and heartburn (R. 30). The doctor modified his diet and had him come back every fifteen days for some time (R. 32). At no time was his gastric

condition deemed sufficient to require drugs, and his symptoms disappeared with normal eating and sleeping habits. It was nothing more than a passing trivial ailment which many people have (R. 180-181). When he first came into the doctor's office his chief complaint did not concern his stomach but the cold, and the stomach investigation was at the doctor's suggestion (R. 180). The doctor further testified that it was nothing uncommon for people to have heartburn, take a little soda and go about their business (in fact he did it himself), that the routine of having Madden come back periodically was the doctor's, and that Madden had no further discomfort two weeks after the examination but was back eating regular food (R. 181).

All the medical testimony was to the effect that cardio spasm was an inconsequential thing. One of the petitioner's witnesses, an internal medicine specialist, said it might be compared to a cramp in the leg, troublesome for awhile but when it was over the leg was "as good as new" (R. 53). Another of petitioner's specialists was familiar with a chronic type of cardio spasm, in the handling of which it was sometimes necessary to dilate the ring between the aesophagus and the stomach, and was troublesome although might "not interfere at all with long life" (R. 64). There are two broad types, acute and chronic; the chronic type being the result of neglecting the acute ones (R. 73). But Madden's was completely cured (R. 32). Evidently the several visits to the doctor, at the doctor's solicitation and not because of any complaint (R. 28), was for the purpose of correcting it, thus to prevent the annoying type from developing. That the purpose was crowned with success is clearly attested from the record.

We need not analyze the evidence further. Suffice it to say that it shows, without conflict, that this was only a trivial and passing thing Madden had, having no bearing

on and no connection with the acute coronary thrombosis of which he died a year or so later (R. 33), 52-53, 64, 80). Such was the testimony of all the doctors on both sides.

Under charge six, given in the *Poole* case (R. 218, note 8) and expressly approved by the Supreme Court of Florida, the failure to note a consultation of or treatment by a physician does not furnish basis for avoiding the policy unless it relates to "Some serious ailment material to the question of life expectancy."

> "Fortunately, the overwhelming weight of authority and almost every recent case upon the subject holds * * * if the medical attendance was for some slight or temporary indisposition which does not contribute to the risk of loss or leave a permanently detrimental effect upon the insured's health, omission to make such disclosure will not relieve the insurer of liability". Appleman on Insurance Law and Practice, Vol. 1, pages 288-291.

The above author goes on to point out that the above rule is supported by many courts which formerly held to the contrary; that the illness may be alarming to the sufferer and yet be trivial and inconsequential from a medical standpoint; and that the courts had gone far enough to include under the head of trivial diseases, "peptic ulcer, prior operation for sinus trouble, slight attacks of influenza and rheumatism, prostatis, or a mild malarial attack", etc.

It is justifiable to suggest that the Florida court in deciding the Poole case was not blazing a new trail but merely following a well established road. See *Prudential Ins. Co.* vs. *Saxe,* 134 F (2) 16, opinion by Mr. Justice Rutledge; *Sovereign Camp* vs. *Moore,* 186 So. (Ala.) 123, where the court points out that some ailments are so serious as to be material as a matter of law, others so trivial as to be immaterial as a matter of law, and still others not assignabel to either class but requiring submission to a jury.

Here again the record in the *Poole* case is helpful as throwing light upon the kinds of ailments the Florida Court considers as falling in the trivial and immaterial class.

Miscellaneous Matters.

Petitioner says that the Florida court did not approve the charges in the *Poole* case as correct abstract statements, appropriate in cases where the *insured* gave the false answer. On the contrary these charges, quoted by the Circuit Court of Appeals specifically go upon the theory that the *insured gave the false answer.* It is quite clear that the *Poole* case involved two theories of defense to the charge that Poole had made false answers in his application for the insurance. First, it was denied that he answered falsely ("gave such answers") and second, it was alleged as a basis of waiver or estoppel, that the company's agent wrote in the answers without the knowledge of the applicant. The court disposes of both by announcing the rule applicable where the false answer is given by the applicant, viz. that they do not vitiate the policy if made in good faith, approving the charges of the trial court (charges 5 and 6, R. 218) as appropriate to that issue and the evidence submitted under it. The court also announced the rule applicable in cases where the agent supplied the answers, with which we are not concerned.

The Circuit Court of Appeals had no doubt that these charges were directed to cases where the false answer was given by the applicant, and it said so in positive terms (R. 218). It had the record of the *Poole* case before it and could readily resolve any doubt left by the opinion as to what the issues, evidence and charges were. We fail to appreciate the soundness of petitioner's position before this court contending that the *Poole* case did not involve certain things and that the Circuit Court of Appeals mis-

construed it, though it does not bring to this court the Poole record.

Petitioner also contends that the correctness of these charges was not properly determinable by the Florida court on certiorari. The answer to this would seem to lie in the fact that the court did review them, expressly holding they were appropriate.

Petitioner says it has seen no case holding that a misrepresentation by way of fact will not bar recovery unless made with conscious intent to deceive, where it was known to be false and was deliberately made (brief page 12). This is an effort to involve an otherwise simple proposition by the confusing process of combining inconsistent quotations from the first and last opinions in these cases. The last opinion does not hold that the answer was given deliberately, with knowledge of its falsity, or that it was material as a matter of law. It held that the good faith of Madden was for the jury. If this is to be tested by whether the answer was deliberately made, then that too is for the jury, notwithstanding any language in the first opinion. The test is not, however, whether the applicant knowingly gave an answer which he knew did not conform to the exact facts. The test is whether he answered falsely for the purpose of deceiving the company to its prejudice. An applicant might have cut a finger and gone to a surgeon to have a stitch put in it. The next week, after the finger is well, he might be examined for insurance, be perfectly conscious that he was treated by the doctor a week before and with these facts fully present in his mind, he might say he had not been treated by a physician without the slightest intention to deceive the company.

Petitioner refers to the case of *Sun Life Assur. Co.* vs. *Maloney,* 132 F (2) 388, a very recent Florida case decided by the Fifth Circuit Court of Appeals, and intimates that

it is inconsistent with its opinion in these cases. It even purports to say what counsel did and did not argue in that case. We have no way of knowing what was argued, nor do we think it matters. Maloney had recently spent considerable time in bed, being treated for a heart ailment which all men of any intelligence know is a serious matter, having a very material bearing on life expectancy. The court found that reasonable men could not have found Maloney had forgot this episode when answering that he had not consulted or been treated by a physician, the equivalent of saying he deliberately answered falsely. Certainly he could not in good faith have thought it not material. This is a perfect illustration of the difference between the man who had been treated for a cut finger and Maloney who had been treated for heart disease. This illustrates the difference between Maloney's case and the cases at bar. Madden had no serious aliment. His was trivial and passing. He had a right to believe from the words of his own doctor that he was perfectly sound. According to the evidence, he was. What motive could he have had to withhold the facts? How can it be supposed he falsely answered with intent to deceive, when he had no earthly reason to deceive? It was rightly held that these cases were for the jury.

Respectfully submitted,

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